

1 2008 to the programming division. But that  
2 price would change because it had an MFN, if  
3 say DirecTV were able to acquire this  
4 programming for [REDACTED], or [REDACTED].

5 JUDGE SIPPEL: I understand that,  
6 but they're just moving money around on the  
7 books. Right?

8 THE WITNESS: Precisely.

9 JUDGE SIPPEL: Thank you.

10 BY MR. SCHMIDT:

11 Q And when Comcast was moving money  
12 around on the books, it was willing to show  
13 itself as paying that much. Right? As far as  
14 you know.

15 A With the MFN in place, yes.

16 Q But when they were having to pay  
17 less money for the games, [REDACTED] for the  
18 games to the NFL Network, they were not  
19 willing to pay that amount. Correct?

20 A You're comparing apples and  
21 oranges.

22 Q Am I correct that Comcast was not

1 willing to pay [REDACTED] for those same games  
2 to the NFL Network?

3 A They are willing to pay the [REDACTED]  
[REDACTED], but on a sports tier.

5 Q They were never planning on  
6 carrying Versus on a sport tier, were they?  
7 Yes or no?

8 A Yes, they accepted the [REDACTED]  
9 from the NFL Network on the sports tier. And,  
10 yes, they were going to carry Versus on  
11 expanded basic with a surcharge, and a MFN in  
12 place.

13 Q Let me break that out, because you  
14 answered a different question than asked. My  
15 question is, you never saw a document where  
16 Comcast said if Versus carries these games,  
17 we'll pay them, but we're going to put them on  
18 a sports tier. You never saw that, did you?

19 A Right. Because it's an internal  
20 transfer.

21 Q Okay. But when it's an external  
22 transfer, when it's an unaffiliated company,

1 when it's a company Comcast doesn't own, in  
2 this case the NFL Network, when the NFL  
3 Network said we want you to pay not [REDACTED],  
4 but [REDACTED] for the games, Comcast said no,  
5 not unless you're on a sports tier. Right?  
6 Correct?

7       A       From an economic perspective,  
8 you're comparing apples and oranges, because  
9 it's the cost of carriage, when it's your own  
10 programming, there are benefits to vertical  
11 integration, because you don't have to -- the  
12 economic concept is called double  
13 marginalization elimination, and there are  
14 efficiencies from ownership. And, so, it's  
15 really comparing apples and oranges, and  
16 that's why this is not a good comparable for  
17 the situation we face here. And that's why I  
18 focused precisely from an economic perspective  
19 on what the non-vertically integrated cable  
20 companies have done.

21       Q       Let me ask -

22               JUDGE SIPPEL: That's all well and

1 good, but I think what Mr. Schmidt is doing,  
2 he's getting a reality check. I mean, you can  
3 do all these regressions and progressions you  
4 want, but that -

5 THE WITNESS: I haven't done any  
6 regressions, Your Honor.

7 JUDGE SIPPEL: Whatever you want  
8 to call this, the point is that when NFL is  
9 being paid -- I mean, this is, as Comcast  
10 would have it, they're being paid say [REDACTED]  
11 by Comcast, but they have to go up on the top  
12 tier.

13 THE WITNESS: Right.

14 JUDGE SIPPEL: Now, supposing they  
15 were paying them [REDACTED], that they would pay  
16 them [REDACTED], could they -- well, that  
17 wouldn't make sense, would it? Then they  
18 wouldn't be able to stay down. What would --  
19 what do they have to do to stay down from the  
20 D2?

21 THE WITNESS: I'm not sure I'm  
22 understanding.

1 JUDGE SIPPEL: Well, they have to  
2 go up on the tier. That's what you -- that's  
3 what all of this is showing. Right?

4 THE WITNESS: Well -

5 JUDGE SIPPEL: It's not?

6 THE WITNESS: Let me try to  
7 interpret, I think what Comcast did when they  
8 received the surcharge, and the price went up  
9 to [REDACTED], actually, for Comcast. That was  
10 the average at [REDACTED].

11 JUDGE SIPPEL: Yes.

12 THE WITNESS: They decided to tier  
13 the programming, move it from D2 to the sports  
14 tier.

15 JUDGE SIPPEL: But not for Versus.

16 THE WITNESS: Versus is still [REDACTED]  
[REDACTED], give or take, and it's carried on  
18 expanded basic.

19 JUDGE SIPPEL: Yes.

20 THE WITNESS: But it's the right  
21 hand of Comcast paying the left hand of  
22 Comcast.

1 JUDGE SIPPEL: Okay.

2 THE WITNESS: And, so, if Versus  
3 had gotten the eight games -

4 JUDGE SIPPEL: The eight games,  
5 yes.

6 THE WITNESS: The eight games, the  
7 right hand would have paid the left hand more,  
8 but it's just an internal accounting transfer,  
9 as you've noted.

10 JUDGE SIPPEL: I see. That goes  
11 back, again, though, to the -- what is it, the  
12 some odd billion, or some odd billion for five  
13 years. I mean, just outright cash.

14 THE WITNESS: Well, it's [REDACTED]  
[REDACTED] of cash.

16 JUDGE SIPPEL: [REDACTED] of  
17 cash. And another [REDACTED] of value.

18 THE WITNESS: As part of the  
19 equity.

20 JUDGE SIPPEL: As -- the value  
21 would be [REDACTED] of the equity, or whatever  
22 it is.

1 THE WITNESS: I believe it was [REDACTED]  
[REDACTED] of the equity in OLN. So they were  
3 going to give -

4 JUDGE SIPPEL: NFL would get [REDACTED]  
[REDACTED] of OLN or Versus.

6 THE WITNESS: Precisely.

7 JUDGE SIPPEL: And so they get [REDACTED]  
[REDACTED], plus [REDACTED] something.

9 THE WITNESS: A [REDACTED].

10 JUDGE SIPPEL: A [REDACTED]  
[REDACTED], yes. Okay. I'm with you. I'm with  
12 you.

13 BY MR. SCHMIDT:

14 Q Just to be fair, Mr. Orszag, it  
15 actually represents the [REDACTED]. Right?

16 A I don't think that's correct.  
17 But, again, these -- I'm just looking at this  
18 document that you gave me. It was [REDACTED]  
[REDACTED] in cash.

20 JUDGE SIPPEL: Which one are you  
21 looking at now? What number does it have on  
22 it?

1 THE WITNESS: The bottom is 62168.

2 JUDGE SIPPEL: Does it have an  
3 exhibit -- it has an exhibit number.

4 THE WITNESS: I'm sorry, 90.

5 JUDGE SIPPEL: Okay. Go ahead.

6 THE WITNESS: It says [REDACTED]  
7 in cash, and then it says an equity option, [REDACTED]  
[REDACTED], that's the [REDACTED] with straight  
9 price at OLN Enterprise value of [REDACTED].

10 BY MR. SCHMIDT:

11 Q Let me ask you one question, then  
12 I'll move on. And it's a yes or no question,  
13 if you can answer it yes or no. Is it your  
14 testimony that it's okay for Comcast to say  
15 we'll pay the surcharge for the games on  
16 Versus, because that's all us keeping the  
17 money in the family. But we won't pay the  
18 surcharge, a lower surcharge if the games are  
19 on the NFL Network? Yes or no?

20 A I do not believe that it is a  
21 comparable to look at a vertically integrated  
22 programming versus non-vertically integrated



1 programming. The more appropriate comparable,  
2 as I discussed, is to consider Comcast as a  
3 cable-only entity, a cable-only within the  
4 four corners -- and assume that they did not  
5 have vertically integrated programming. And  
6 that's why I looked at Charter, and the  
7 Cablevisions of the world.

8 Q Are you able to answer the  
9 question asked yes or no?

10 A I think I answered it with --  
11 providing the explanation.

12 Q Can you answer it yes or no?

13 A It's not really a yes or no  
14 question.

15 Q Okay. If you can't answer it,  
16 then that's fine. Now, you -- we talked a  
17 little earlier -- just so I understand.  
18 Comcast has an MFN provision with the NFL  
19 Network, doesn't it?

20 A I believe it does. It's been a  
21 while since I looked at the contract, but I  
22 believe it does.

1           Q       So that's not something special to  
2 Versus.

3           A       No, many -- Comcast was able to  
4 negotiate MFNs in many contracts.

5           Q       So, Comcast gets the same MFN  
6 benefit through the NFL Network that it would  
7 get through Versus. Right?

8           A       Yes, although I'm somewhat  
9 confused about the MFN that's in place,  
10 because my understanding is DirecTV is  
11 receiving a -- MFN is a legal provision, and  
12 so -- and I'm not a lawyer. I'm looking at  
13 it as an economist. I know that DirecTV is  
14 paying a [REDACTED] surcharge, and Comcast is  
15 paying a [REDACTED] surcharge. It's not  
16 something I've analyzed, so I can't tell you  
17 how the MFN works, precisely, because it's  
18 legalese.

19                   MR. TOSCANO: Your Honor, I'd like  
20 to note for the record, Comcast has an MFN  
21 claim against the NFL Network in the New York  
22 action.

1 JUDGE SIPPEL: Comcast has an MFN  
2 claim against?

3 MR. TOSCANO: There are  
4 allegations that the -

5 JUDGE SIPPEL: NFL?

6 MR. TOSCANO: NFL Network is not  
7 abiding by the MFN, which I think is relevant  
8 to the premise of these questions, that the  
9 MFN in the NFL Network contract is the same as  
10 the MFN in the Comcast contract.

11 MR. SCHMIDT: That was a  
12 retaliatory counterclaim, and we filed our  
13 breach of contract action against Comcast,  
14 that came back with a host of various claims  
15 against the NFL, Your Honor.

16 JUDGE SIPPEL: Well, you can  
17 characterize it any which way, but the point  
18 is that you've got the counterclaim for the  
19 violation, alleged violation of the MFN.

20 MR. TOSCANO: And the point is,  
21 the premise of his question is that the NFL  
22 Network abides by the MFN provision. I was

1 simply noting for the record that there are  
2 allegations that they do not, in fact, abide  
3 by them.

4 JUDGE SIPPEL: All right.

5 BY MR. SCHMIDT:

6 Q Mr. Orszag, you're not an MFN  
7 expert?

8 A I have reviewed many MFNs, but I  
9 would not consider myself an MFN expert.

10 Q You haven't conducted an analysis  
11 of the MFNs in this case.

12 A Other than looking at different  
13 contracts and contract prices, and knowing  
14 which contracts have MFNs in place, no, I have  
15 not.

16 Q Okay. We talked earlier about a  
17 number that represents the amount of money  
18 that Comcast would have to pay under the NFL  
19 Network's proposed remedy. Right?

20 A Yes.

21 Q That number was spread across five  
22 years. Right?

1           A       Again, I didn't calculate it, but  
2 I believe that to be the case. So, I don't  
3 have it sitting here, so I'm working with  
4 limited information.

5           Q       Okay. And it -- well, you gave it  
6 earlier.

7           A       Well, I recited what I'd heard.

8           Q       What you'd heard. And that number  
9 is less than [REDACTED] per year. Right?

10          A       It would work out to less than  
11 [REDACTED] per year.

12          Q       Now, you're not here to tell the  
13 Court, are you, that if Comcast was forced to  
14 carry, as a result of this litigation, the NFL  
15 Network, that it would obtain no benefit at  
16 all from carrying the NFL Network on expanded  
17 basic?

18          A       I haven't said that at all.

19          Q       Do you agree with me -

20          A       In fact, in my written testimony,  
21 I discuss the balancing of the benefits and  
22 the harms.

1           Q       Okay.  There is some benefit  
2 Comcast would get from carrying the NFL  
3 Network.  Right?

4           A       I do not disagree with that.

5           Q       Okay.  And that benefit would  
6 offset some portion of that less than [REDACTED]  
[REDACTED] a year.  Right?

8           A       Presumably, it would -- there  
9 would be some offset.

10          Q       Some of that benefit might come  
11 from new subscribers.  Right?

12          A       Potentially, although, there isn't  
13 much evidence that they've lost subscribers  
14 due to the fact that they don't carry it on  
15 the digital tier.

16          Q       Well, I asked you that question in  
17 your deposition, and you indicated that you  
18 weren't comfortable giving an opinion on  
19 whether or not Comcast had lost subscribers as  
20 a result of moving the NFL Network up to the  
21 sports tier.  Do you remember that?

22          A       I think I had a more nuanced

1 answer, which said I hadn't seen the data yet,  
2 and the data you presented to me, I was not  
3 comfortable relying upon, because of the  
4 Adelphia Time Warner transition. And,  
5 subsequently, we have obtained data that  
6 focuses on the digital tier by system, and  
7 I've been able to extract that, the systems  
8 that there has been -- that they got as part  
9 of the Adelphia deal, and there is no evidence  
10 to suggest that they have lost subscribers.

11               MR. SCHMIDT: Your Honor, this is  
12 data that hasn't been given to us, certainly  
13 not in the form Mr. Orszag is describing it.

14               MR. TOSCANO: Your Honor, that's  
15 not true. All this data has been produced to  
16 the NFL.

17               MR. SCHMIDT: When was it  
18 produced?

19               MR. TOSCANO: On Wednesday.

20               MR. SCHMIDT: On Wednesday.

21               MR. TOSCANO: Tuesday, sorry.

22               JUDGE SIPPEL: Tuesday this week?

1 MR. TOSCANO: Tuesday last week.

2 MR. SCHMIDT: That's over a week  
3 and a half after his direct testimony.

4 JUDGE SIPPEL: Wait a minute. Do  
5 we have a number for the day, that would help.  
6 It's April, anyway. The month is April, and  
7 the day is what? I know today is the 16th.  
8 Yes, but what date was it turned over?

9 MR. SCHMIDT: Two nights ago?

10 MS. MALASPINA: Tuesday. This  
11 Tuesday.

12 JUDGE SIPPEL: So that's the 14th.

13 MR. SCHMIDT: This is a week and a  
14 half after his testimony, Your Honor, and  
15 after we've had a chance to depose him.

16 MR. CARROLL: Your Honor, Dr.  
17 Singer gave us brand new information from Mr.  
18 Schmidt in the hallway, and I remember -- this  
19 has come up before, and I didn't complain to  
20 Your Honor. I said we'll let it go. We'll  
21 take the information. We got a whole new  
22 regression amendment to Mr. Singer within



1 minutes of when he took the stand. We gave  
2 you more notice than you gave us on Singer,  
3 and you're complaining about it. It's not  
4 fair.

5 MR. SCHMIDT: Here's what we did,  
6 Your Honor.

7 JUDGE SIPPEL: Well, I'm really  
8 not too worried about this yet, but what seems  
9 to be the trouble?

10 MR. SCHMIDT: My concern is that  
11 Mr. Orszag is changing his testimony, Your  
12 Honor, from his deposition.

13 JUDGE SIPPEL: Then he's got a  
14 problem.

15 THE WITNESS: I didn't change -

16 JUDGE SIPPEL: Go ahead. I'm  
17 sorry.

18 THE WITNESS: I didn't change my  
19 testimony at all. What I said -

20 JUDGE SIPPEL: No, you don't have  
21 to get into this.

22 THE WITNESS: Okay.

1 JUDGE SIPPEL: All right?

2 THE WITNESS: Sure.

3 JUDGE SIPPEL: You're clean right  
4 now. Now, wait. You're saying that you have  
5 a suggestion here of a conflict in testimony  
6 between the deposition and what he's testified  
7 today?

8 MR. SCHMIDT: That's as I  
9 understand it, Your Honor.

10 JUDGE SIPPEL: Well, that's not  
11 going to do -- there's a way of getting at  
12 that. Do you plan to get at it, or do you  
13 plan to just move along?

14 BY MR. SCHMIDT:

15 Q Let me ask you this question, Mr.  
16 Orszag. Is there any -

17 JUDGE SIPPEL: Wait a minute.  
18 Answer my question.

19 MR. SCHMIDT: Oh, absolutely, Your  
20 Honor.

21 JUDGE SIPPEL: What are you going  
22 to do?

1                   MR. SCHMIDT: I'm sorry. I didn't  
2 mean to not answer your question. I  
3 apologize.

4                   JUDGE SIPPEL: Can we just move  
5 this along?

6                   MR. SCHMIDT: Yes.

7                   JUDGE SIPPEL: Or do you have a  
8 serious enough situation that we're going to  
9 have to at this a different way?

10                  MR. SCHMIDT: Given what Mr.  
11 Orszag offered on direct, and given that I  
12 don't understand this to appear in his written  
13 testimony, I can move along.

14                  JUDGE SIPPEL: Thank you.

15                  BY MR. SCHMIDT:

16           Q        You agree with me, don't you --  
17 well, let me ask you this question. Did you  
18 look -- have you now had the chance to look at  
19 whether Comcast gained subscribers when it  
20 started carrying the NFL Network?

21           A        I have examined data for the  
22 digital tier for Comcast going back to I think

1 the beginning of 2006, and there is no  
2 evidence that there's been any bump in the  
3 rate of growth that Comcast has achieved due  
4 to -- at any point in time, like when the NFL  
5 games were on, when they decided to tier the  
6 NFL Network, or when they didn't have the  
7 games on the digital tier, but rather had it  
8 on the sports tier.

9           MR. SCHMIDT: Your Honor, this is  
10 the question I was trying to avoid, which is  
11 why I asked my question about 2004, which is  
12 when they began to carry the NFL Network. I'm  
13 either going to have to raise an objection to  
14 not having this data sufficiently in advance,  
15 or move to strike the last answer. If we can  
16 move to strike it, then I'll move on.

17           MR. TOSCANO: Your Honor, this was  
18 an analysis that was done in direct response  
19 to Dr. Singer's written testimony, which we  
20 did not receive until the 6th. We exchanged  
21 the testimony simultaneously.

22           JUDGE SIPPEL: Yes.

1           MR. TOSCANO: So this was a  
2 response to Dr. Singer.

3           MR. SCHMIDT: I don't think that's  
4 a fair characterization, Your Honor. What  
5 happened was I spent a lot of time in the  
6 depositions, as Mr. Orszag -

7           JUDGE SIPPEL: What day did you  
8 take -- roughly, when was his deposition?

9           MR. SCHMIDT: It was -

10          THE WITNESS: Four days before I  
11 turned in my written direct testimony.

12          MR. SCHMIDT: It was April 1st,  
13 2009. It was supposed to be the week before,  
14 but Comcast moved the deposition date to  
15 accommodate some other depositions. I asked  
16 Mr. Orszag a number of questions about this.  
17 Mr. Orszag said he didn't have the data. We  
18 got the report, the data wasn't reflected in  
19 the report. And then, I guess, two nights ago  
20 we got some kind of spreadsheet late at night  
21 that didn't mean -

22          MS. MALASPINA: It was in the

1 afternoon, sir.

2               MR. SCHMIDT: Well, I was in  
3 court, so for me it was late at night. That  
4 didn't mean anything to us, that I can't sort  
5 out. Our expert had testified, I believe, by  
6 that point, or was halfway through his  
7 testimony by that point. I don't think that's  
8 fair to get new data. What we gave Mr.  
9 Carroll was a recalculation based on a new  
10 contract that was actually written. This is  
11 new data that was available before, that was  
12 in direct response to questions I asked Mr.  
13 Orszag about during his deposition. And I'll  
14 move on, if the last answer is stricken from  
15 the record.

16              JUDGE SIPPEL: Well, it's your  
17 cross examination.

18              MR. SCHMIDT: I'll strike my  
19 question.

20              JUDGE SIPPEL: It's your cross  
21 examination.

22              MR. SCHMIDT: I'm moving to strike

1 the last answer.

2 JUDGE SIPPEL: So you're going to  
3 withdraw your -

4 MR. SCHMIDT: I will withdraw my  
5 question.

6 JUDGE SIPPEL: -- question and the  
7 answer?

8 MR. SCHMIDT: Yes.

9 JUDGE SIPPEL: The question gets  
10 withdrawn, too.

11 MR. SCHMIDT: Yes.

12 JUDGE SIPPEL: All right. Let's  
13 go.

14 BY MR. SCHMIDT:

15 Q Do Versus and the NFL Network  
16 compete?

17 A We should define -- I spend my  
18 life thinking about competition issues, so as  
19 we've talked about in the deposition, we have  
20 to define markets in which they may compete.

21 Q What about for subscribers? Who  
22 competes -- I'm sorry. What about for

1 viewers, who competes with Versus for viewers?

2           A       I think that the -- I think a fair  
3 characterization, as Dr. Singer puts forward,  
4 is that just about every channel competes for  
5 eyeballs. And there are certain viewers who  
6 like sports programming, and they will let --  
7 they will tend to view sports channels as  
8 substitutes for each other. But the critical  
9 question is the closeness of substitution, so  
10 they could be substitutes for some small group  
11 of consumers, but for the vast majority they  
12 are not.

13          Q       You haven't done an analysis, have  
14 you, of the substitution of viewers between  
15 Versus and the NFL Network?

16          A       It's extremely difficult, if not  
17 impossible to do that analysis.

18          Q       Have you done the same analysis  
19 for the Golf channel, or the NFL Network?

20          A       I have not done a statistical  
21 analysis of that.

22          Q       Do you have any basis for saying



1 that they have fundamentally different  
2 viewership, the NFL Network, Golf Channel, and  
3 Versus?

4       A       Fundamentally is a word that I'd  
5 rather not use, because it -- I would say  
6 this. There is certainly some overlap in  
7 viewers, and there is certainly many viewers,  
8 like myself, who watch one, but not the  
9 others.

10       Q       Which one do you watch?

11       A       The Golf channel.

12       Q       And you watch NFL football.

13       A       But I've never watched the NFL  
14 Network.

15       Q       Have you measured that overlap?

16       A       No, I have not.

17       Q       Do you know whether it's greater  
18 or lesser than [REDACTED]?

19       A       No. Observing overlap doesn't  
20 mean they're actually substitutes for each  
21 other.

22       Q       Okay. But you can't rule out the